

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

DEREK FOLLEY,

Plaintiff, : Case No. 3-22-cv-16

- vs -

District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

BARBARA P. GORMAN, et al.,

:
Defendants.

DECISION AND ORDER STRIKING AFFIDAVIT

This case, brought *pro se* by Plaintiff Derek Folley, is before the Court on Plaintiff's Affidavit of \$9,000,000 in Damages for Motion for a Default Judgment (ECF No. 100).

The Affidavit is STRICKEN for the following non-exclusive reasons:

1. No defendant in this case is in default. The Magistrate Judge has denied each motion made by Folley to declare a Defendant in default (ECF Nos. 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, and 90).
2. Plaintiff's claim is not for "a sum certain or a sum that can be made certain by computation." That language in Fed.R.Civ.P. 55(b) refers to a situation in which a defaulting defendant failed to pay, for example, an itemized invoice. Folley's claim in this case is for compensatory and punitive damages under 42 U.S.C. § 1983 for violations by Defendants of his constitutional rights in the course of a criminal case in the Montgomery County Court of Common

Pleas, damages which would have to be assessed by a jury. Fed.R.Civ.P. 65(b) does not authorize a plaintiff to pick a “sum certain” out of the air.

3. The Magistrate Judge has already recommended Folley’s complaint be dismissed under *Heck v. Humphrey*, 512 U.S. 477 (1994)(Report, ECF No. 71). Folley was notified that any objections to that Report were due to be filed within seventeen days of its mailing to him, to wit, by March 24, 2022, and none have been filed as of the date of this Order.

In sum, the Affidavit is incompetent to prove damages and irrelevant because no Defendant is in default. The Affidavit is therefore STRICKEN.

April 3, 2022.

s/ *Michael R. Merz*
United States Magistrate Judge